INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 53

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 105–112) is reported at 351 F.2d 224. The decision and order of the National Labor Relations Board (R. 95–103) are reported at 148 NLRB 414.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1965 (R. 112–113). On December 10, 1965, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including January 8, 1966 (R. 114). The petition for a writ of certiorari was filed on January 7, 1966, and was granted on April 18, 1966 (R. 115; 384 U.S. 903). The juris-

diction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether the National Labor Relations Board was without jurisdiction to adjudicate an unfair labor practice controversy because its decision required the interpretation of a provision of the collective bargaining contract relied upon as a defense by the employer.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 31–34.

STATEMENT

The Board certified the Union[1] as representative of the Company's production and maintenance employees in August, 1962 (R. 84). The parties subsequently entered into a collective bargaining agreement, effective May 1, 1963 (R. 61–72). Article XVII of the contract, captioned "Wages," provided (R. 67–68; emphasis added):

> A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written agreement. *The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like.* The payment of such a premium rate shall not be

[1] Plywood, Lumber and Saw Mill Workers, Local Union No. 2405, AFL–CIO.

> considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee of the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement.[2]

The contract also provided that all wage rates listed in the contract wage scale were closed "for the term of the * * * Agreement, subject to opening in the same manner as provided" in the contract termination provision (R. 71–72). The contract contained no provision for arbitration of disputes between the Company and the Union (R. 97, n. 4).

---

[2] During an early bargaining session, the Company's negotiator, Thomason, mentioned that another lumber products company had proposed an "incentive" bonus system for its plywood department. The Union's negotiator declared that the Union would not agree to such a plan, and the matter was not pursued further during that meeting. (R. 86; 9, 10.) At a later meeting, the parties reached agreement with respect to the general "wage clause" of the contract and reduced it to written form, for incorporation into the contract when agreement was reached on the other terms (R. 86; 44). Thereafter, on March 12, 1963, the parties discussed the specific wage rates for the covered employees and a temporary deadlock occurred over the rates for the glue spreader crews (R. 86; 14). Following separate discussions by each side with a Federal Conciliator, the parties met again jointly and the Company, through Thomason, mentioned that it was "giving thought" to the possibility of promulgating a premium or incentive pay program for glue spreader crews. The Union negotiators did not make any reply to this comment. (R. 87–88, 98; 12–13, 14–15, 43–44, 53, 56.) The parties resolved the remaining differences at a bargaining session on April 10, and signed the final agreement on May 1, 1963 (R. 88, 96).

The Company employs approximately 30 men as members of several "glue spreader" crews.[4] Each crew is normally composed of one "core feeder," two "core layers," and one "sheet turner." The hourly rates of these jobs, as set out in the contract wage scale, are: sheet turner, $2.15; core feeder, $2.24; core layer, $2.29 (R. 96, n. 1; 71).

On May 20, 1963, less than one month after the collective bargaining agreement was concluded, the Company posted a notice that a "premium pay schedule" would "be tried for the next couple of months to determine how it will work for all concerned." Under the new schedule all members of a glue spreader crew were to receive increased pay at the rate of $2.50 per hour whenever the crew as a whole met certain production standards within a two week (later changed to one week) period (R. 88–89; 73). The Company placed this pay schedule in effect without prior notice to, or bargaining with, the Union; the Union learned about the plan from one of its members about a week after the plan was instituted (R. 89; 9).

By letter dated May 27, 1963, the Union asked the Company for a conference to discuss the "premium pay schedule" notice. The letter stated (R. 74–75):

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon by the Union. As a matter of fact

[4] The total number of employees of the Company represented by the Union is between 181 and 201 (R. 86–87; 16).

while we are perfectly willing to discuss increasing the hourly rates, or to the putting into effect premium hourly rates, we do not consider the subject of production bonuses, or wage rates based upon production standards, to be properly open for negotiation at this time.

The parties met on June 7 and 13, 1963. The Union requested rescission of the pay plan, but the Company refused, although it offered to discuss the terms of the plan (R. 90, 96; 10–11, 13, 18–19, 45, 77–79). The Union thereupon filed unfair labor practice charges with the Board, alleging that the Company had violated its bargaining obligation by unilaterally instituting the plan, and a complaint was issued (R. 1–4).

The Board rejected the Company's contention that it lacked jurisdiction to adjudicate the unfair labor practice question by virtue of the fact that a question of contract interpretation was involved in evaluating the Company's defense that its unilateral action was authorized by the "premium pay" provision of the contract. After consideration of the history of the contract negotiations and the terms of the contract provision viewed in light of the ordinary statutory right to bargain over wages, the Board found that the premium pay clause had been designed to authorize individual merit increases and had not been intended to give the Company the right unilaterally to raise the wages of entire crews on the condition that they meet certain production standards. The opposite result, the Board found, would be "so contrary to labor relations experience that it should not be inferred unless the lan-

guage of the contract or the history of negotiations clearly demonstrates this to be a fact." [4] Accordingly, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages without prior bargaining. (R. 95–100.) The Board ordered the Company to cease and desist from the unfair labor practice found, to bargain with the Union upon request with respect to the institution of a premium pay plan for the glue spreader crews, and, if requested by the Union, to rescind any plan unilaterally instituted (R. 100–101).[5]

The court of appeals denied enforcement of the Board's order. The court held that, since "the ex-

[4] The Board concluded that the normal meaning of the contract clause was that the Company had "the right to make individual merit increases for special competence or skill." The Company's construction of the clause, on the other hand, would permit it "to select a group of employees and unilaterally change the method of compensating them from a straight hourly basis, with a fixed rate for each job category, to what is in effect a production basis, by raising the hourly contract wage rate contingent upon increased productivity." This construction "would be tantamount to saying that the Union inferentially surrendered to [the Company] the right unilaterally to establish production standards and wage rates based thereon as a method for compensating employees. Such an intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact." (R. 99.) The Board concluded that the mere fact that the Company's negotiator, in the contract negotiations, had mentioned that the Company was "giving thought" to the possibility of promulgating a premium pay or incentive wage program for glue spreader crews" (see n. 2, *supra*) was not sufficient to constitute a waiver of the Union's statutory right to bargain over such a plan (R. 98).

[5] Member Leedom dissented from the Board's decision (R. 102).

2——33——180-682

istence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective-bargaining agreement," the Board could not proceed because this dispute was "beyond the subject-matter jurisdiction of the Board"; rather, it was "a matter for arbitration where * * * the collective-bargaining agreement so provides, or for adjudication by the Courts," where, as here, there was no arbitration provision (R. 105–112). The court concluded that the Board could not act until the contract defense relied upon by the Company had been tested in a separate judicial proceeding (R. 112).

ARGUMENT

INTRODUCTION AND SUMMARY

The Company in this case unilaterally instituted a wage plan whereby the members of its "glue spreader" crews would receive increased pay—above the hourly rates specified in the collective bargaining agreement—whenever the crew to which they belonged met certain production standards. The Union charged that this unilateral action was an unfair labor practice in violation of the duty to bargain collectively imposed by Section 8(a)(5) of the National Labor Relations Act. It is clear that, absent any valid defense, the Company's unilateral action would, in fact, violate Section 8(a)(5). See, *e.g.*, *National Labor Relations Board* v. *Katz*, 369 U.S. 736.

As a defense, the Company relied upon its contract with the Union, one provision of which reserved to

the Company the right to pay "a premium rate * * * to reward any particular employee for some special fitness, skill, aptitude or the like * * *". The Company urged that its wage plan was authorized by this provision and that the Union had therefore bargained away or waived its ordinary statutory right to be consulted about the institution of the wage increase. The Union, on the other hand, argued that the Company's plan was not a particular reward under the "premium rate" clause but a general change in the wage scale as to which the Union had not intended to relinquish its right to bargain.

The Board sought to adjudicate the contract dispute between the parties in order to determine whether the contract did, in fact, constitute a defense to the unfair labor practice charge. It construed the disputed provision in the light of its terms, the history of the contract negotiations, and the principle that an intention on the part of the Union to waive the fundamental right to bargain over generally applicable wage rates "is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact" (R. 99, see n. 4, *supra*, p. 6). It concluded that the contract had, in fact, only been meant to authorize individual merit increases. Accordingly, the Board held that the Company's unilateral action with respect to wage rates violated Section 8(a)(5) of the Act.

In our view, the Board thus properly exercised jurisdiction to determine the existence of an unfair

labor practice in this case despite the existence of contract questions relevant to the Company's defense.* While the Board, we recognize, has no power to interpret or enforce collective bargaining agreements as such, we think it evident that the Board's jurisdiction to adjudicate affirmative statutory unfair labor practice charges is not precluded—as the court of appeals held—merely because a contractual defense to the statutory charge is interposed. It is clear that the Board has authority, in similar situations, to adjudicate unfair labor practice charges despite the existence of overlapping or threshold questions of contract interpretation. There is no reason why the same power should not be applicable to contract-defense situations. Board power in such cases not only rests affirmatively upon explicit language in Section 10(a) of the Act, but upon strong considerations making the Board, in many instances, the most appropriate

*The question in this case is, to some extent, related to the question presented in No. 52, O.T. 1966, *National Labor Relations Board* v. *Acme Industrial Co.* Like the issue here, the question in No. 52 concerns the power of the Board to resolve unfair labor practice disputes related to provisions of existing collective bargaining agreements. Unlike the collective bargaining agreement here, however, the agreement in No. 52 contained grievance and arbitration procedures for resolving differences in contract interpretation; the court of appeals in No. 52 held that the existence of these procedures precluded Board power. On the other hand, as we show in our brief in No. 52, the Board there was able to resolve the unfair labor practice controversy without, in fact, resolving any issue of contract interpretation, while such an issue was concededly relevant to the Board's determination here. While we urge in both cases that the Board's statutory power was not precluded, we agree that because of these differences, separate consideration of the issues in the two cases is appropriate.

forum for the adjudication of contract defenses. This, we think it clear, was such an appropriate situation. The contract between the parties contained no arbitration provision—hence no possible conflict with an arbitral solution of the contract dispute was present. Neither had a judicial interpretation been obtained, and no judicial proceeding was pending. The issue of interpretation, on the other hand, was not a difficult one, considerable delay and expense might have inhered in obtaining a separate judicial interpretation of the validity of the Company's defense, and the merit of the defense directly involved statutory considerations more amenable to Board than to judicial resolution.

THE BOARD WAS NOT PRECLUDED FROM DETERMINING THE UNFAIR LABOR PRACTICE CHARGE MERELY BECAUSE SUCH DETERMINATION REQUIRED IT TO INTERPRET A PROVISION OF A COLLECTIVE BARGAINING AGREEMENT RELIED UPON AS A DEFENSE TO THE CHARGE.

We agree, as we have just noted, that the National Labor Relations Act does not empower the Board to interpret the provisions of collective bargaining agreements when those issues are unrelated to alleged statutory unfair labor practices or to the Board's other functions under Sections 9 and 10 of the Act; nor can the violation of a contract provision, as such, ordinarily be affirmatively urged as a statutory unfair labor practice within the Board's domain. See, *e.g.*, *United Mine Workers* v. *National Labor Relations Board*, 257 F. 2d 211 (C.A.D.C.); see also *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395; Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col.

L. Rev. 52, 58, 72–74 (1957).[1] It is clear, however, that this case is not within that category of contract disputes unrelated to specific unfair labor practice allegations. Here the Union, on the contrary, charged that the Company had committed an unfair labor practice by unilaterally raising wage rates—a charge based entirely upon the provisions of the Act, not upon provisions of the contract. The rights asserted here are thus statutory ones—the contract being relevant only as a defense to the statutory charges.

There are several ways in which issues of contract interpretation can thus overlap or be relevant to statutory unfair labor practice charges within the Board's jurisdiction.

(1) A collective bargaining agreement may incorporate a restriction or requirement which is also part of a party's statutory obligation under the Act. For example, the contract may prohibit discrimination against union members—discrimination which is also an unfair labor practice under Section 8(a)(3) of the Act. In these circumstances it has been clear that the duplication of statutory requirements in the terms of the contract—so that the resolution of the unfair

[1] In 1947, Congress rejected a proposal which would have made breach of a collective bargaining agreement as such an unfair labor practice, and provided instead a judicial remedy under Section 301 of the Labor-Management Relations Act. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41–42; 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 545–546. The House Conference Report states that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to be usual processes of the law and not to the National Labor Relations Board," *id.* at 546; see also 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

labor practice dispute perforce resolves the same question which could arise under the contract—does not automatically or generally preclude the Board from providing an unfair labor practice remedy. Otherwise the recognition of statutory obligations in a labor contract would displace the Board's authority to enforce those obligations—an obviously undesirable result. In *Smith* v. *Evening News Ass'n*, 371 U.S. 195, and *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, the Court consequently held that the duplication of statutory requirements in the contract did not preclude Board jurisdiction but merely created two remedies for the same conduct—a Board remedy and a contract remedy—between which the allegedly aggrieved party might ordinarily choose.* In thus upholding the Board's power, the Court noted that, in appropriate circumstances, the Board might properly choose not to exercise its jurisdiction. Specifically, the Court recognized that, where the collective agreement contains an arbitration clause, the Board has ordinarily declined to exercise its jurisdiction in situations where that would permit a party to a prior arbitration proceeding to relitigate before the Board questions already determined by the arbitrator, provided that "the procedure [before the arbitrator] was a fair one and the results were not repugnant to the Act";

* In *Smith*, the contract incorporated the Section 8(a)(3) guarantee against discrimination, and in *Carey*, it incorporated the Section 9(a) guarantee that the representative selected by a majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in that unit for purposes of collective bargaining.

the Court also noted that the Board may also defer decision because of the pendency of arbitration. See *Carey v. Westinghouse Electric Corp.*, *supra*, at 270–271. The Court, however, did not suggest that the Board might—and it certainly did not intimate that it must—decline jurisdiction merely because of the possibility of a co-existing arbitral or judicial remedy.[9]

[9] On the contrary, in *Smith*, the Court specifically stated (371 U.S. at 197): "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301." And, in *Carey*, the Court noted (375 U.S. at 268): "[A] suit either in the federal courts, as provided by § 301(a) * * * or before such state tribunals as are authorized to act * * * is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him." The Court added (*id.*, at 272): "The superior authority of the Board may be invoked at any time." See also *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 47–49 (C.A. 9), certiorari denied, 324 U.S. 877; *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F. 2d 3 (C.A. 2), certiorari denied, 380 U.S. 908.

This recognition of concurrent Board and contract remedies is consistent with the legislative history, which shows that, at the same time it enacted Section 301 of the Labor-Management Relations Act in 1947, 29 U.S.C. 185, which created a federal judicial remedy for contract violations, Congress continued to provide in Section 10(a) of the NLRA that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." The House Conference Report accompanying the 1947 Act states: "By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 52; 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948) 556.

(2) In the situation just described, while the Board's unfair labor practice decision necessarily decides a similar contract question, the Board need not separately determine the meaning of the contract; its decision may be based entirely—as the court of appeals here held that it must be—upon the meaning and application of the statute. In some instances, however, the Act makes it an unfair labor practice for provisions of certain types to be included in collective bargaining agreements; Section 8(a)(3), for example, prohibits certain union security provisions, and Section 8(e) bars so-called "hot cargo" agreements. Where contracts are challenged as being violative of these restrictions, the Board's power to interpret the challenged provision in order to test it by the statutory standard has also been clearly recognized.[10] As the court stated in *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2): "In our opinion the Board was entitled to adopt this view [of the meaning of a contract clause] as a matter of sound policy and reasonable interpretation." It has never been suggested, to our knowledge, that the

[10] As to Section 8(a)(3), see *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78 (C.A. 2); *Great Lakes Carbon Corp.* v. *National Labor Relations Board*, 360 F. 2d 19 (C.A. 4); cf. *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695. The Board makes a similar determination in deciding whether to treat a contract as a bar to a representation election under Section 9. See *Hager Hinge Mfg. Co.*, 80 NLRB 168. As to Section 8(e), see *Meat Drivers Local Union 710* v. *National Labor Relations Board*, 335 F. 2d 709 (C.A.D.C.); *Truck Drivers Union Local 413* v. *National Labor Relations Board*, 334 F. 2d 539 (C.A.D.C.), certiorari denied, 379 U.S. 916.

Board must decline jurisdiction in such cases where the interpretation of the challenged clause is in issue, and await an independent construction of the provision before enforcing the Act's requirements. Again, of course, the Board—while it ordinarily has the power to decide the unfair labor practice question when an issue of interpretation is present—may decline to exercise this power in appropriate circumstances; say, for example, when an arbitral interpretation, expressly agreed upon by the parties, has been finally rendered (or is pending), and its result does not offend fundamental statutory principles. (See *supra*, p. 12, and n. 13, *infra*, p. 18).

(3) The present case differs from that just described in that here a contract provision is asserted as a defense to—rather than as the affirmative basis of—an unfair labor practice charge. That is, here the Union asserted that the Company had violated its duty to bargain in good faith by unilaterally instituting changes in the wage structure immediately after a collective bargaining agreement incorporating wage scales had been entered into. Absent any relevant contract provision, the Company's conduct would be measured directly against its statutory bargaining obligation; the Board found that, so viewed, the Company's action had violated the Act. Here, however, the Company pointed to the "premium rate" provision of the contract as giving it the right to make the unilateral change which was challenged. If the wage change did, indeed, come within that provision, then the Company's act did not violate the statute, for a union may contractually waive its right

to be consulted as to certain matters in return for other contract guarantees. The meaning of the "premium rate" provision—that is, whether it amounted to a waiver of the Union's ordinary statutory right to bargain over a wage change such as the Company made here—was thus an issue in the unfair labor practice charge.

The Board believes that, as in the two other situations which we have described, it has jurisdiction in such a contract-defense case to determine the unfair labor practice charges. Indeed, the Board has consistently evaluated contract defenses in similar contexts and its power to do so has not been doubted."[11] For example, in *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 279–284, employees were discharged when they struck against the employer's unfair labor practices. In response to the union's unfair labor practice charge, the employer urged that the strike had violated a "no-strike" clause in the collective bargaining agreement (the discharge of employees who strike in violation of such a clause does not ordinarily constitute an unfair labor practice under the Act). The union, on the

[11] In 1947, by amending Section 8(a)(3) so as to ban the closed shop and permit the union shop and by requiring the Board to resolve jurisdictional disputes (Section 10(k)), Congress actually increased the instances in which the Board would be required to interpret contract provisions in connection with its unfair labor practice determinations. And, in 1959, Congress added Section 8(e), which further involved the Board in contract interpretation (see *supra*, p. 14).

other hand, urged that the "no-strike" clause did not prohibit strikes against employer unfair labor practices and, hence, that it had not been violated and the discharge of the strikers was unlawful. The Court recognized that the case turned "upon the proper interpretation of the particular contract before us." 350 U.S. at 279. The Board construed the "no-strike" clause in light of "the context of the contract and * * * the language of the clause itself" (*id.* at 283–284) and held that it did not prohibit strikes such as the one which had taken place. While the Court thus explicitly noted the Board's contract interpretation, it affirmed enforcement of the Board's order without suggesting that the Board's exercise of jurisdiction, where contract interpretation had been required, had been improper. See, also, *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71; *W. L. Mead, Inc.*, 113 NLRB 1040; *National Labor Relations Board* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, 577, n. 12; *National Association of Broadcast Engineers*, 105 NLRB 355."

[11] See also *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95. The issue there was whether the contract contained a no-strike clause, so that a strike called by the union was in breach of contract. The Court, while sustaining the jurisdiction of the state court to decide this issue under Section 301, recognized that this did not alter the Board's unfair labor practice power. "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such." 369 U.S. at 101, n. 9.

We also believe that the instant case—where the contract contained no arbitration provision, where a judicial interpretation had not been obtained nor was a judicial proceeding pending, and where the issue of contract interpretation was not only within the Board's competence but closely entwined with evaluation of a relevent statutory provision—constituted a clearly appropriate exercise of this Board authority.[13]

[13] The Board ordinarily declines jurisdiction over questions of contract interpretation relevant to unfair labor practice charges when the contract contains an arbitration provision, when the parties have already obtained, or are in the process of obtaining, a decision thereunder, and when it is "reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act." *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1416. See this Court's decision in *Carey*, *supra*, p. 12; *International Harvester Co.*, 138 NLRB 923, 927, affirmed *sub nom. Ramsey* v. *National Labor Relations Board*, 327 F. 2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003. See also *C & S Industries*, 158 NLRB No. 43; *Spielberg Mfg. Co.*, 112 NLRB 1080; *Dubo Mfg. Corp.*, 142 NLRB 431, 148 NLRB 1114; but cf. *Thor Power Tool Co.*, 148 NLRB 1379, 1381, affirmed, 351 F. 2d 584, 587 (C.A. 7). The Board likewise accords deference to an arbitrator's award in representation cases. See, *e.g.*, *Raley's Supermarkets*, 143 NLRB 256.

On the other hand, if there is no outstanding arbitration award or pending arbitration proceeding, or in the relatively rare case, like the present one, where the contract does not contain an arbitration procedure at all (see 1 CCH Labor Law Reporter, Union Contracts-Arbitration, par. 58,660, indicating that more than 90 percent of 1717 major collective bargaining agreements provided for arbitration at the terminal point), the Board will ordinarily not refrain from determining the contract issue insofar as it relates to the unfair labor practice charge if it concludes either that the issue is insubstantial, or that it involves a matter central to the system of collective bargaining established by the Act, thus requiring the applica-

A. The Board's jurisdiction in such circumstances is directly supported by Section 10(a) of the National Labor Relations Act (29 U.S.C. 160(a)), which provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." It is,

---

tion of principles developed under the Act and not merely traditional principles of contract interpretation. See R. 97, n. 4; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Smith Cabinet Mfg. Co.*, 147 NLRB 1506; *Century Papers, Inc.*, 155 NLRB No. 40; *The Crescent Bed Co.*, 157 NLRB No. 22; *C & S Industries*, 158 NLRB No. 43. As we show in the text, the present case clearly fell within the latter category where the Board deems exercise of its jurisdiction to be appropriate.

Some of the earlier decisions of the Board reflect an even narrower view of the proper exercise of the Board's power in the presence of an arbitration agreement, *i.e.*, that the Board will refrain from deciding any question of contract interpretation that is capable of being resolved under the contract grievance and arbitration procedure. See *Consolidated Aircraft Corp.*, 47 NLRB 694, 705–706 (but note that the Board, although dismissing the refusal to bargain portions of the complaint, found that the employer's action violated Section 8(1) of the Act, *id.*, at 709; however, this finding was not fully sustained, 141 F. 2d 785 (C.A. 5)); *McDonnell Aircraft Corp.*, 109 NLRB 930, 934–935; *Crown Zellerbach Corp.*, 95 NLRB 753; *United Telephone Co. of the West*, 112 NLRB 779; *Morton Salt Co.*, 119 NLRB 1402; *National Dairy Products Corp.*, 126 NLRB 434. The Board's continued experience with the problem has led it to qualify and refine its earlier view. Cf. *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674 ("The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way * * * and has modified and reformed its standards on the basis of accumulating experience.").

we believe, impossible to read this provision consistently with the holding of the court of appeals that Board jurisdiction is excluded, in favor of a prior judicial decision on the relevant question of contract interpretation, whenever the determination whether an unfair labor practice exists "arguably" involves a construction of a provision or provisions of the collective bargaining agreement which are urged as a defense to the statutory charge (R. 111).

The court's holding means that the Board would, in all cases, have to delay enforcement of the statute until the relevant contract provision had been finally judicially determined—a process which might well take several years and would likely be much more expensive than a single Board proceeding. (See the court of appeals' decision at R. 112.) A prompt administrative determination and enforcement of the statutory requirements, however, is frequently essential to the safeguarding of statutory rights; a delayed enforcement of the statute may amount to no meaningful enforcement at all. We believe that it therefore would plainly "affect" the power of the Board to deal with unfair labor practices, within the meaning of Section 10(a), if an employer may always postpone the statutory Board proceeding in favor of a judicial determination regarding the meaning of the contract provisions merely by interposing such a provision as an "arguable" defense, regardless of its ultimate merits.

B. Nor are there any important countervailing policies which might be thought to overcome the appropriateness of Board power here despite the explicit statu-

tory recognition that Board jurisdiction is not to be displaced by co-existing remedies. In a case such as this one, where the parties have not entered into an arbitration agreement, the exercise of Board power cannot possibly come into collision with the policy favoring arbitral solutions of labor disputes recognized in this Court's *Steelworkers* decisions.[*] We also think it evident that, where no judicial interpretation of the relevant provision had ever been secured or sought, no national policy can be thought to favor state or federal judicial determinations over Board power exercised under Section 10, thus requiring the Board to abstain while a judicial proceeding is commenced. Indeed, as we now show, strong considerations of federal policy, in addition to the avoidance of delay, clearly make the Board the more appropriate primary forum in cases, like the present one, where the relevant contract provision is closely entwined with statutory requirements and policies and where the terms used in the contract may take on fuller meaning when viewed in the special context of collective bargaining relationships with which the Board is familiar.

As the present case shows, contract defenses to unfair labor practice charges frequently may not be judged merely as abstract questions of contract law, dissociated from statutory considerations; they must, instead, often be evaluated in light of applicable statutory considerations. Here, for example, the

[*] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

question was the scope of the unilateral employer action with regard to wages permitted by the "premium rate" provision of the collective bargaining agreement. Absent any relevant contract provision, the employer's unilateral authority on this subject would be relatively narrow. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736; *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217. The question of "contract interpretation" in this case, then, was not a question of the meaning of contract terms, as such, but a dispute over whether, and to what extent, the Union had waived or bargained away its ordinary statutory right to bargain over wage changes.

The decision of such a question cannot properly be made without bringing to bear a full appreciation of the scope and tradition of the statutory right alleged to have been waived, matters as to which the Board has been entrusted with primary statutory responsibility. The agreement must be read "as a whole and in light of the law relating to it when made." *Mastro Plastics Corp., supra*, 350 U.S. at 279. In addition, the Board is likely to be especially sensitive to the significance, in a labor relations context, of terms such as "premium" pay as used in the agreement in this case. Cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 269: "But if the word be deemed to have a peculiar connotation for those intimate with trade-union affairs, it is incumbent upon us to give the word its technical meaning * * *. If such be the

case, then of course the Board's expertness comes into play." The Board in this case found the Company's contention as to the meaning of the contract "contrary to labor relations experience" (R. 99). In these circumstances the Board concluded that the Company's interpretation should not be inferred unless the terms of the contract or the history of its negotiation clearly confirmed the alleged waiver of bargaining rights.[15] The Board's approach to such waiver contentions has been repeatedly affirmed as likely to lead to a correct decision regarding the intention of the parties.[16]

[15] See *Mastro Plastics Corp.*, *supra*, 350 U.S. at 283: "Whatever may be said of the legality of such a waiver [of the right to strike over an unfair labor practice] when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in * * * this contract."

[16] The Board, with court approval, has held that a waiver of statutory rights must be clear and unmistakable, and that such waiver will not be found merely from the circumstance that the contract omits specific reference to a subject protected by the National Labor Relations Act, that it contains a general management prerogative clause, or that the union in the contract negotiations was unsuccessful in receiving contract protection for its statutory right. See the cases cited in our brief in *National Labor Relations Board* v. *Acme Industrial Co.*, No. 52, this Term, pp. 12–13, n. 9. See, in addition, *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680 (C.A. 2); *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766, 768 (C.A. 6), certiorari denied, 335 U.S. 814; *Proctor Mfg. Co.*, 131 NLRB 1166; *New York Mirror*, 151 NLRB 834, 839–841. And note *Electrical Workers* v. *General Electric Co.*, 332 F. 2d 485, 489, n. 3 (C.A. 2), certiorari denied, 379 U.S. 928. The Board has recently applied these principles, for example, to determine that a union had not waived its right to bargain about subcontracting, where the contract was silent on that subject, where it contained a general management prerogatives

If the Board, on the other hand, were not permitted thus to bring its cumulative expertise in the meaning of labor agreements *vis-a-vis* statutory rights to the resolution of such waiver questions, the result might well be an indirect dilution of the statutory guarantees through judicial decisions which, by virtue of unfamiliarity with the special context of labor contracts, might too readily assume that important safeguards have been abandoned. At the same time, a question regarding an asserted waiver of statutory rights such as that in this case involves few, if any, techniques or traditions of standard contract law with regard to which the Board might be deemed to lack competence as compared with a state or federal court. It would, indeed, have strained the normal meaning of language to construe a clause, which permits the payment of "a premium rate * * * to reward any particular employee for some special fitness, skill, aptitude or the like," as authorizing an employer to make a broad revision in the system for computing wages—converting it from a straight hourly basis with a fixed rate for each job category to an incentive pay system, with employees being paid a uniform rate based not on individual, but on group performance.[17]

---

clause, and where the union had sought during the contract negotiations to obtain a ban upon subcontracting, but had failed. See *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410.

[17] The contract specified the following wage rates per hour: core layer, $2.29; core feeder, $2.24; sheet turner, $2.15 (R. 71). Under the Company's incentive pay plan, if the glue spreader crew exceeded its quota, all members of the crew, irrespective of their individual performance, were paid the uniform rate of $2.50 per hour. This erased the differential which the contract

C. A final consideration relevant to the decisional process also supports the Board's power here. If contract-defense questions were required in all cases to be decided judicially, rather than by the Board, their decision would often take place in a substantially abstract context. The union's affirmative claim or cause of action in such cases is statutory—here, for example, that the Company failed to bargain in good faith as required by Section 8(a)(5). Unless there is a contract provision embodying the same requirements, the union cannot present any affirmative claim in court, but must attempt merely to obtain a declaratory judgment regarding the meaning of the contract clause urged by the employer as a defense to the Board proceeding. Assuming that such declaratory relief is available,[18] the existence of the asserted defense to the union's statutory claim would be decided wholly outside the context of the statutory right to which that defense pertains, thus increasing the likelihood that the relevant statutory considerations will not be

had provided in the rates of the various members of the crew. (R. 39, 17, 42.) The contract also contained a so-called "zipper clause" (Art. XIX, R. 68–69), which recites that each party "had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining," and that therefore "for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement." *See New York Mirror*, n. 16, *supra*.

[18] Many states may not have declaratory judgment procedures which would encompass such a request for an interpretation

developed. Moreover, even if the Union can point to a contract provision as the basis for other than declaratory judicial relief (in this case, for example, such a contract contention might be based on Article I of the contract, R. 61, requiring the Company "to deal with and recognize the Union as the sole bargaining agency with respect to wages, hours, and other terms and conditions of employment * * *"), it is by no means clear that a state or federal court would treat such a provision as the equivalent of the full statutory right to good-faith bargaining. Again, therefore, the contract defense might not be seen in its proper perspective as an asserted waiver of statutory rights."

In sum, we believe that the Board was not automatically precluded from deciding this case by the mere assertion of a contract defense and that strong considerations, in fact, supported the exercise of Board power. For the Board to have refrained from exercising its jurisdiction here would have necessitated a substantial delay in the effectuation of the statute—

---

as a predicate for an unfair labor practice charge, and Section 301 of the Labor Management Relations Act (29 U.S.C. 185), under which federal judicial power would be based, is restricted on its face to authorizing "[s]uits for violation of contracts," not suits to determine the scope of potential contract defenses to unfair labor practice charges.

" Should relief be available to a union under such a contract provision when a statutory requirement is also violated, it is clear, as we show *supra*, pp. 12–13, in discussing this Court's decisions in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 and *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, that the union would not thereby be required to avail itself of the contract remedy rather than the Board's jurisdiction. See also *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (n. 12, *supra*, p. 17).

perhaps as long as several years—while a final judicial determination was obtained. The contract issue presented was in no respect beyond the Board's competence and, indeed, the Company's contention that the Union had waived its statutory bargaining rights through the "premium pay" provision directly concerned considerations of labor relations experience in the context of the Act—including application of the salutary principle that waivers of statutory rights will not lightly be assumed—as to which the Board was the most appropriate forum. Nor, finally, did the Board here attempt to re-examine any decision of the question which had previously been reached between the parties or to perform any function which might in any event have been left to private arbitration.[20]

[20] Since the contract in this case contained no arbitration provision, the question need not be reached of the effect of such a clause—providing for arbitral settlement of disputes over the meaning or application of the contract—upon the Board's jurisdiction to interpret contract provisions invoked as defenses to unfair labor practice charges. As noted n. 13, *supra*, p. 18, the Board itself ordinarily declines to exercise jurisdiction to re-interpret provisions which have once been subject to arbitration and it also ordinarily declines jurisdiction where arbitration of the relevant provision is pending. The Board, however, does not feel similarly bound to defer in all cases to the mere presence of an arbitration clause, when that clause has not been invoked by either party to resolve the pertinent question of interpretation.

The Board recognizes, in this connection, that, by entering into an arbitration agreement, the parties have thereby agreed to utilize private machinery to determine questions of contract interpretation, and that it would often further the policy favoring the private resolution of disputes to honor that agreement. See Cox and Dunlop, *The Duty to Bargain Collectively During the*

Term of an Existing Agreement, 63 Harv. L. Rev. 1097, 1101–1102 (1950). However, the Board believes that there are at least two situations where the policies of the NLRA would not be effectuated by construing a contract grievance and arbitration procedure as automatically precluding it from interpreting a contract provision which is raised as a defense to an unfair labor practice charge. Where it appears that the contract issue is clearly insubstantial, to remit the case to the arbitrator would only invite respondents in unfair labor practice proceedings to raise frivolous contract defenses in order to delay Board jurisdiction. And, even where the contract question is substantial, the Board believes that a distinction may properly be drawn between a question which is not basic to the Act's regulatory scheme and turns essentially on principles of contract interpretation, and one which is central to that scheme and involves the application of statutory principles.

Thus, when an employer, such as the Company in this case, claims that his unilateral action is privileged under the contract, the evaluation of this claim usually requires more than the interpretation of a specific contract provision. The employer claim is ordinarily based, at least in part, on such general circumstances as a management prerogative clause, the fact that the contract does not specifically prohibit the action taken, or the union's failure to gain a specific prohibition during contract negotiations. The Board, under the NLRA, has developed principles for evaluating these general circumstances, which either may be ignored or misapplied by an arbitrator. For example, as shown, n. 16, *supra*, p. 23, the Board has held that a waiver of statutory rights must be clear and unmistakable and has formulated certain principles for determining when a waiver will be found. An arbitrator, on the other hand, who is ordinarily merely concerned with whether there has been a breach of the agreement, might never consider these principles, and, if he did, he might well apply them differently than would the Board. Many arbitrators, for example, apply the so-called "residual rights" theory when management takes unilateral action, holding that it is free to act unless the collective agreement expressly provides otherwise. See Elkouri, *How Arbitration Works*, 287–288 (BNA, 1960); *C. Pinkerton, Inc.*, 44 LA 1109; *Bethlehem Steel Co.*, 30 LA 675, 682, note and cases cited there; *Celanese Corp. of America*, 33 LA 925, 942,

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case should

---

943–944; *Mead Corp.*, 46 LA 459, 468. Such a doctrine, which bestows upon management all "residual rights," stands on its head the established rule that a statutory waiver must be express and clear; it flows from an approach wholly inconsistent with decisions such as that of this Court in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, holding that the NLRA, in certain circumstances, imposes a duty to bargain about subcontracting apart from any requirement in the collective agreement itself.

In short, where "contract" questions are central to the statutory scheme and involve application of statutory principles—as they do, for example, in this case—reference to an arbitrator may well lead to a result in conflict with the policies of the Act. The Board believes, in such situations, that it may decide the contract question itself when it finds that, for these reasons, it does not come "to us in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy" (*Cloverleaf Division*, *supra*, at 1416). See Lesnick, *Arbitration As a Limit on The Discretion of Management, Union, and NLRB: The Year's Major Developments*, Proceedings of New York University, 18th Annual Conference on Labor, 7, 24–25 (1966).

be remanded to that court with instructions to enforce the Board's order.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

PAUL BENDER,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAWRENCE M. JOSEPH,
Attorney,
National Labor Relations Board.

SEPTEMBER 1966.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449), as amended (29 U.S.C. 151, *et seq.*), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at

reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without

resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * *

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

* * * * *

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * *

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed

in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:

* * * * * * *

The relevant provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et. seq.*) are as follows:

SEC. 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * * * *

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1960